



UNITED SOUTH AND EASTERN TRIBES, INC.
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December 22, 2003

Mr. Gerald P. Vaughan
Deputy Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Vaughan:

Thank you for taking the time to meet with me, Ken Carleton, Greg Smith and Eric Tober. We found it very valuable to hear your views on the application of Section 106 of the National Historic Preservation Act to the licensing of communications towers by the FCC.

There is a great deal at stake for USET in this matter. In the course of the last 250 years, tribes have been displaced off of 98% of their lands principally by the United States. For the USET tribes, the percentage of lost lands is even greater. In many cases, tribes were forcibly relocated thousands of miles from their ancestral territories. As a result of this, although a significant portion of our religious and cultural heritage has survived, it is mostly not on current tribal lands. This heritage is a large part of our identity as a people. We must do our utmost to protect this heritage and to honor thereby the perseverance of our ancestors through very dark times.

We know that the best way to protect this heritage is by finding solutions where everyone's needs are recognized and addressed. Throughout the process of commenting on the draft nationwide programmatic agreement and our discussions with the FCC on a Best Practices document, USET has sought to find a process that will: facilitate the FCC's Section 106 obligations; assure expedited review at reasonable costs for Industry; and protect tribal sacred sites from unnecessary harm due to the construction of communications towers. In the absence of a workable alternative, USET tribes will have to seek full consultation with the FCC on many sites to assure that our interests are protected.

As we emphasized, many of the fears expressed by Industry, such as that they would have to contact 550 tribes or would have to pay exorbitant costs, are unfounded. USET has committed itself to the development of a tribal lands database that would enable Industry to quickly and easily identify which, if any tribes have an interest in a particular area. In the overwhelming majority of cases that number will be in the single

"Because there is strength in Unity

digits, and often it will be only one or two. On the issue of costs for accessing tribal expertise, USET is putting together a model reimbursement schedule intended to cover tribal costs, not create a tribal profit center. This reimbursement schedule will be based on what is commonly charged by other governmental organizations, such as the States, when requests are made to their State Historic Preservation Officers.

Of course, you and I sharply disagreed on whether or not tribes possess “special expertise” that may be necessary for the proper evaluation of a site. As tribal people, we know that only we fully understand the significance of many places and artifacts to us. Our unique expertise should be recognized - this is our heritage! In fact, it is hard to imagine outsiders having more than a superficial understanding of our complicated spiritual worldview. The scientific perspective of archeological firms and museum “experts” has for years been used to justify “excavating” (we call it grave robbing) and displaying our ancestors and the handling of sacred objects in a blasphemous fashion.

I realize that these are not issues that would commonly come before you. However, we have had extensive discussions on these matters with the Federal agency principally responsible for overseeing the Section 106 process - the Advisory Council on Historic Preservation. The ACHP has concluded that tribes do have “special expertise” and as far as the Federal government is concerned has resolved this issue by specifically requiring in their regulations that “agency official[s] shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” 36 C.F.R. § 800.4(c) (1). Thus, it was deeply troubling to us that you were unwilling to make this acknowledgment.

USET understands that from a federal contracting point of view, this “special expertise” puts tribes in the position of being the sole source for key information in order for the Federal government to meet its basic obligation under the NHPA to take into account the effects of its undertakings on Historic Properties included in or eligible for inclusion in the National Register of Historic Places (which may include properties of “traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization”, 16 U.S.C. § 470a(d)(6)(A). Let me repeat USET’s position – we are only seeking to recover the costs of providing this special expertise. It is notable that every other expert required for the siting and construction of a communications tower is compensated (e.g., engineers, architects, surveyors, environmental firms, attorneys, the FCC, etc.). Why is there such resistance to compensating tribes for the costs of providing their special expertise? Frankly, we see this resistance in light of how we have been treated historically and, for that reason; do not take this matter lightly.

As we discussed, Section 106 not only requires the Federal government to take into account the effect of its undertakings, but separately obligates Federal agencies to consult with Indian tribes (16 U.S.C. § 470a(d)(6)(B). That consultation requirement is with regard to the official position of our tribal governments on an FCC undertaking. We do not seek compensation from the FCC for that consultation. But when the FCC or an applicant needs to evaluate a site with regard to tribal properties, they need our “special

expertise". Tribes cannot provide this expertise for free. They need compensation to recover the costs of doing work that ultimately benefits Industry.

The second issue I would like to address is your characterization of the Federal Tribal consultation obligation. You stated that you had ample resources to engage in direct tribal consultation because the FCC was an administrative agency and such consultation would consist of an "exchange of letters", after which you would make a decision. We must alert you that, without exception, every Indian tribe in the United States would stridently disagree with your characterization.

Tribes vigorously defend the government-to-government relationship between themselves and the United States. The single most important aspect of that relationship is consultation. This is so significant that there is a presidential executive order solely addressing the consultation requirement (Executive Order 13175 - Consultation and Coordination With Indian Tribal Governments). The significance of this order with regard to sacred sites is heightened by another presidential executive order on that issue (Executive Order 13007 – Indian Sacred Sites). The ACHP has issued a detailed guidance document entitled "Consulting with Indian Tribes in the Section 106 Review Process." Perhaps most relevant to your work, is the FCC's own "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes." The FCC statement succinctly summarizes several major doctrines in Federal Indian law and policy, including the centrality of the government-to-government relationship, the recognition of tribal sovereignty and the Federal government's trust responsibility to Indian tribes. Much of this is relevant to the question of what constitutes adequate consultation, but I would like to draw your attention to one paragraph in that statement in particular:

"3. The Commission will strive to develop working relationships with Tribal governments, and will endeavor to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes that uniquely affect telecommunications compliance activities, radio spectrum policies, and other telecommunications service-related issues on Tribal lands."

We do not accept that an "exchange of letters" constitutes a "working relationship" or is an example of the FCC endeavoring "to identify innovative mechanisms to facilitate Tribal consultation in agency regulatory processes"

I realize that this is a lengthy letter. But I wanted to explain in detail where we are coming from on these issues. I look forward to a continued dialogue. We understand that whatever is ultimately developed must work not only for Tribes, but also for the FCC and for Industry. We do not wish to stand in the way of the development of an improved communications network; indeed, we support its expansion. But that expansion should not come at the expense of tribal sacred sites or tribal rights.

Again, thank you for meeting with us, especially on such short notice. Please do not hesitate to give me a call if you have any questions about what I have written here, or if I can be of any other assistance to you.

Sincerely,

A handwritten signature in cursive script, reading "James T. Martin". The signature is written in black ink and is positioned above the printed name.

James T. Martin
Executive Director